Dr. Smt. Krishna Dixit Vs State Of Chhattisgarh And Ors

Court: Chhattisgarh High Court

Date of Decision: May 14, 2019

Acts Referred: Constitution Of India, 1950 â€" Article 226
Code Of Criminal Procedure, 1973 â€" Section 154(1), 154(3), 156(3), 174, 190, 200, 482
Indian Penal Code, 1860 â€" Section 269, 304, 304A

Hon'ble Judges: Sanjay K. Agrawal, J

Bench: Single Bench

Advocate: Abhishek Sinha, Vaibhav Maheshwari, Ravi Kumar Bhagat, Abhishek Sharma

Final Decision: Allowed

Judgement

1. The petitioner is a registered medical practitioner and a qualified Gynecologist. Smt. Divya Soni, wife of respondent No.4, was admitted in Dixit

Clinic and Nursing Home, which was being run by her husband and father-in-law both being doctors, for delivery of second issue on 12-3-2015 and

she delivered a healthy girl child without any surgical intervention and thereafter, she underwent Conventional Tubectomy (CTT) operation which was

performed by the petitioner after obtaining her consent. During the hospitalisation, on 15-3-2015 she developed blurring of vision, allergic rashes etc.,

which was duly said to be addressed and attended by the petitioner and for which certain tests were conducted to investigate the cause of rashes and

other complaints of patient Smt. Divya Soni. On detecting less platelets counts from the blood report, she was referred to higher medical centre and

she was admitted in Narayana Hospital, Raipur on the same day, but after three days of treatment at Narayana Hospital, Raipur, on 18-3- 2015, she

expired and the child survived.

2. On 18-3-2015, mother of the deceased patient filed complaint before Police Station Pandri, Raipur alleging medical negligence on the part of doctors

including the petitioner. The police authorities registered inquest under Section 174 of the CrPC and dead body was sent for postmortem. Postmortem

was performed and opinion relating to cause of death was reserved and viscera was sent for obtaining report from Viscera Histopathology in which

no micro- organism was reported. On the report instituted by the mother of the deceased, the Chief Medical and Health Officer (CMHO), Distt.

Durg, constituted a Medical Board to enquire into the matter and submit report whether any act or omission on the part of the petitioner constitutes

medical negligence. On 31-7-2015, the team of doctors as constituted by the CMHO submitted its report and held that the petitioner is a duly qualified

and competent doctor to perform TT operation and she has not committed any negligence, however, the Board pointed out some irregularities in

maintaining the Nursing Home.

3. On 12-8-2015, the Station House Officer, Police Station Durg made some query with regard to medical negligence from the CMHO, Durg on

which it was informed on 12-8-2015 itself that as per the medical report, no negligence has been committed in treating the deceased. The CMHO in

terms of the Family Planning Scheme has directed the petitioner for payment of â‚¹ 2,00,000/- as compensation under the Family Planning Indemnity

Scheme which the petitioner had already paid. Thereafter, nothing took place.

4. On 14-1-2016, respondent No.4 filed a complaint under Section 156(3) of the CrPC before the Chief Judicial Magistrate, Durg seeking a direction

for registration of first information report (FIR) under Section 304 Part-II of the IPC against the petitioner. On receiving the said complaint, the

learned Magistrate firstly called report from the concerned police station seeking information whether any investigation has been conducted by the

police authorities in the matter and fixed the case for hearing on 20-1- 2016. The Station House Officer, Police Station, Durg, on 19-1- 2016 intimated

the learned Chief Judicial Magistrate that morgue was registered as Morgue No.36/2015 and inquest and enquiry was made and report from the

CMHO seeking his opinion on the point of medical negligence was called and in the report, the CHMO intimated that it is not the case of medical

negligence and therefore no offence was found to have been committed and the deceased died due to Disseminated Intravascular Coagulation.

5. The learned Chief Judicial Magistrate heard the arguments on the application under Section 156(3) of the CrPC and by order dated 1-2-2016, by a

detailed order, directed the Station House Officer to hold a preliminary enquiry in terms of the decision of the Supreme Court in the matter of Lalita

Kumari v. Government of Uttar Pradesh and others (2014) 2 SCC 1 and thereafter, the offence has been registered against the petitioner on 18-2-

2016 for offences punishable under Sections 269 and 304A of the IPC. It is the case of the petitioner that respondent No.4 had also made a complaint

to the Medical Council of India and the said compliant was referred to the Ethics Committee of the Chhattisgarh Medical Council, Raipur and after

examining the complaint of respondent No.4, the Committee by its order dated 23-2-2016 has opined that the petitioner is not guilty of medical

negligence.

6. Now, the petitioner by way of this writ petition, takes exception to the order directing investigation and registration of FIR in exercise of power and

jurisdiction under Section 156(3) of the CrPC as well as seeks quashment of FIR for offences punishable under Section 304A read with Section 269

of the IPC.

7. Return has been filed by the State / respondents No.1 to 3 as well as by the private respondent stating inter alia that the petitioner is guilty of

medical negligence and therefore the Magistrate has only directed for investigation of the offence after registration of FIR for which no exception can

be taken and the writ petition deserves to be dismissed.

8. Mr. Abhishek Sinha and Mr. Vaibhav Maheshwari, learned counsel appearing for the petitioner, would submit that the impugned order directing

investigation under Section 156(3) of the CrPC is in teeth of the provisions contained in Sections 154(1) & 154(3) of the CrPC, as respondent No.4

has not complied with the provisions contained in Sections 154(1) & 154(3) of the CrPC which is prerequisite for directing investigation as per the

decision rendered by the Supreme Court in Lalita Kumari (supra) and non- compliance of the provisions contained in Sections 154(1) & 154(3) of the

CrPC runs contrary to the decision rendered by the Supreme Court in the matter ofP riyanka Srivastava and another v. State of Uttar Pradesh and

others (2015) 6 SCC 287. Mr. Sinha would further submit that the impugned order directing investigation under Section 156(3) of the CrPC is illegal

and contrary to the law as laid down by the Supreme Court and the Delhi High Court in case of criminal liability of medical practitioners in treating

patients i.e. Jacob Mathew v. State of Punjab and another (2005) 6 SCC 1 ,Martin F. D'Souza v. Mohd. Ishfaq (2009) 3 SCC 1, Priyanka Srivastava

(supra), Kusum Sharma and others v. Batra Hospital and Medical Research Centre and others (2010) 3 SCC 48,0 Dr. Suresh Gupta v. Govt. of NCT

of Delhi and another (2004) 6 SCC 422, A.S.V. Narayanan Rao v. Ratnamala and another (2013) 10 SCC 741 ,Jayshree Ujwal Ingole v. State of

Maharashtra and another (2017) 14 SCC 571, Meenakshi Jain v. State and another 2012 SCC OnLine Del 333 4and Sanjeevan Medical Research

Centre (Private) Ltd. and others v. State of NCT of Delhi and another 2011 SCC OnLine Del 751.

9. Mr. Ravi Kumar Bhagat, learned Deputy Government Advocate appearing on behalf of the State/respondents No.1 to 3, would submit that though

initially, the offence has been registered as directed by the Chief Judicial Magistrate, but after investigation, closure report has been prepared, as no

case of medical negligence has been found, but the final closure report is yet to be submitted to the learned Chief Judicial Magistrate having

jurisdiction.

10. Mr. Abhishek Sharma, learned counsel appearing for respondent No.4, would submit that the learned Magistrate has only directed for investigation

after registration of offence which is strictly in accordance with law and no exception can be taken to the said direction issued by the learned

Magistrate, as such, the writ petition being premature deserves to be dismissed.

11. On medical negligence, the Supreme Court has laid down certain precautions to be taken while summoning doctors. In the judgment rendered in

Jacob Mathew (supra), Their Lordships have laid down the following precautions in paragraphs 48(5), 51 and 52 of the report that has been followed

in Martin F. D'Souza (supra) and Kusum Sharma (supra).

Ã¢â‚¬Å“48.(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be

negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal

negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher

degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word Ã¢â‚¬Å“grossÃ¢â‚¬ has not been used in Section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must

be of such a high degree as to be Ã¢â‚¬Å“grossÃ¢â‚¬. The expression Ã¢â‚¬Å“rash or negligent actÃ¢â‚¬ as occurring in Section 304-A IPC has to be read as

qualified by the word Ã¢â‚¬Å“grosslyÃ¢â‚¬â€‹.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something

which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard

taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential

ingredient. All that we are doing is to emphasize the need for care and caution in the interest of society; for, the service which the medical profession

renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a

complainant prefer recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation.

Such malicious proceedings have to be guarded against.

52. Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State

Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future

which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint

may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another

competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before

proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a

doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion

applying the Bolam v. Friern Hospital Management Committee, (1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD t)est to the facts collected in

the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled

against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied

that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.Ã¢â‚¬â€‹

12. Very recently, in the matter of Bijoy Sinha Roy (dead) by Legal Representative v. Biswanath Das and others (2018) 13 SCC 224 T,heir Lordships

have held that safeguards were necessary against initiation of criminal proceedings against medical professionals and till such safeguards are

incorporated by the State, direction of this Court will operate to the effect that the private complaint will not be entertained unless credible opinion of

another competent doctor in support of the charge of rashness was produced. The investigating officer must obtain independent and competent

medical opinion preferably from a doctor in Government service, qualified in the field concerned in the light of judgment in Jacob Mathew (supra).

13. In Martin F. D'Souza (supra), Their Lordships observed that uncalled for proceedings of medical negligence can have adverse impact on access to

health and held that while action for negligence can certainly be maintained, there should be no harassment of doctors merely because their treatment

was unsuccessful. This view has subsequently been followed in Kusum Sharma (supra), Dr. Suresh Gupta (supra), A.S.V. Narayanan Rao (supra),

Jayshree Ujwal Ingole (supra), Meenakshi Jain (supra) and Sanjeevan Medical Research Centre (Private) Ltd. (supra).

14. From the aforesaid judgments, it is quite vivid that the basic and underlying principle of these three judgments is that every careless act of a

medical man cannot be termed as Ã¢â‚¬criminalÃ¢â‚¬. It can be termed Ã¢â‚¬Å“criminalÃ¢â‚¬ only when the medical man exhibits a gross lack of competence or

inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. It has been

emphasized by the Court that mere error of judgment or an accident does not involve criminal liability or mere inadvertence or some degree of want of

adequate care would not create criminal liability though it may create civil liability. In Martin F. D'Souza (supra), it was further held by Their Lordships

as under: -

Ã¢â‚¬Å“106. We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or

National) or by the criminal court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or

the criminal court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical

negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then

issued to the doctor/hospital concerned. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further

warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathews case,

otherwise the policemen will themselves have to face legal action.Ã¢â‚¬â€‹

15. Reverting to the facts of the present case in light of the principles of law laid down in Jacob Mathew (supra) and Martin F. D'Souza (supra), it

appears that the complaint of respondent No.4 and his relative was referred by the Station House Officer, Police Station Durg to the CMHO who

constituted a team of four doctors, which enquired and investigated the matter qua the medical negligence alleged to have been committed by the

petitioner and gave the following report: -

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1. . ...

2. 14.03.2015

3.

Infection

DIC with ARF with Post Partum Sepsis with MODS

4. 15.03.2015 DIC

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1. Family Planning Indemnity Scheme 1 A. 02

Operational Peocedure For Claim settlement from 01.04.2013 8.1.1 ( )

2. ,

3. 14.03.2015

16. A careful perusal of the aforesaid report would show that certain recommendations were made for renewal of license of the Nursing

Home and the Nursing Home was not recognised to perform surgery and yet not affiliated. The CMHO on his enquiry on such report conducted by

the Station House Officer, Police Station Durg by Annexure P-4, concluded as under: -

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1.

(. . .)

2. - , .. , .

17. The aforesaid report would show that the CMHO concluded that the petitioner was competent to perform CTT operation and while performing

the said surgery, no sign of medical negligence was found. Respondent No.4 did not pursue further, as the entire enquiry was done on inquest, but

thereafter, respondent No.4 filed an application under Section 156(3) of the CrPC on which report was called and the learned Magistrate by order

dated 1-2-2016, by a detailed order, directed for holding preliminary enquiry as held in Lalita Kumari (supra) and thereafter, FIR was registered for the

aforesaid offences which has been called in question.

18. From the aforesaid narration of facts, it is quite vivid that complaint of respondent No.4 / his relative made to the Station House Officer, Police

Station Durg, was referred to the CMHO and the CMHO rightly, as held in Jacob Mathew (supra) and Martin F. D'Souza (supra), referred the matter

to a committee of four doctors who thoroughly investigated and made recommendations as narrated herein-above in which except procedural

irregularities with regard to the Nursing Home, no medical negligence attributable to the surgery performed by the petitioner was found, only

compensation to be paid to the victim's family was recommended which the petitioner is said to have complied with under the Family Planning

Indemnity Scheme. On query raised by the Station House Officer, the CMHO on 12-8-2015 clearly held that no sign of negligence was found as per

the team of four expert doctors. As such, the complaint of respondent No.4 was fully investigated qua the medical negligence by the petitioner and

nothing was found that the petitioner was negligent in performing the surgery of Smt. Divya Soni which is in accordance with the principles of law laid

down by Their Lordships in Jacob Mathew (supra) followed consistently and recently up to Jayshree Ujwal Ingole's case (supra).

19. Now, the question would be, whether the aforesaid report submitted by the team of doctors which was duly accepted finding the case of no

medical negligence, the learned Chief Judicial Magistrate is justified in directly entertaining the application under Section 156(3) of the CrPC,

especially when no adverse material has been filed by the complainant?

20. Application under Section 156(3) of the CrPC can be filed by the aggrieved person on account of non-registration of FIR in support of the

cognizable offence in terms of Section 154(1) of the CrPC, then the appropriate course of remedy open to him is to approach the Superintendent of

Police under Section 154(3) of the CrPC and if FIR is not registered in respect of the cognizable offence, the aggrieved person has to file appropriate

compliant under Section 200 of the CrPC which may be enquired under Section 156(3) read with Section 200 of the CrPC or he can maintain

application under Section 156(3) of the CrPC, but the condition precedent for maintaining application under Section 156(3) is, he must have made

application under Section 154(1) of the CrPC and thereafter, on refusal by the Station House Officer to register FIR, he must have filed application

under Section 156(3) of the CrPC. Their Lordships in Priyanka Srivastava (supra) in paragraphs 30 & 31 of their report have emphasised the need for

compliance of Sections 154(1) & 154(3) of the CrPC before maintaining an application under Section 156(3) of the CrPC. Paragraphs 30 & 31 of the

said report read as under: -

Ã¢â‚¬Å“30. In our considered opinion, a stage has come in this country where Section 156(3) CrPC applications are to be supported by an affidavit duly

sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would

be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are

compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain

persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision

which can be challenged under the framework of said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue

advantage in a criminal court as if somebody is determined to settle the scores.

31. We have already indicated that there has to be prior applications under Sections 154(1) and 154(3) while filing a petition under Section 156(3).

Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction

that an application under Section 156(3) be supported by an affidavit is so that the person making the application should be conscious and also

endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with

law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of

the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a

number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and

the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari1 are being filed. That apart, the

learned Magistrate would also be aware of the delay in lodging of the FIR.Ã¢â‚¬â€‹

21. Reverting to the facts of the present case in light of the requirement indicated in Priyanka Srivastava (supra) for maintaining an application under

Section 156(3) of the CrPC, a careful perusal of the application under Section 156(3) of the CrPC would show that there is compliance of Section

154(1) of the CrPC. The complainants have made application to the Station House Officer which was enquired into ultimately, no cognizable offence

is said to have been committed by the petitioner, but there is no compliance of Section 154(3) of the CrPC, as no application was made to the

Superintendent of Police, Durg prior to making application under Section 156(3) of the CrPC. Their Lordships in Priyanka Srivastava (supra) have

clearly held that compliance of Sections 154(1) & 154(3) of the CrPC is mandatory in order to make the application under Section 156(3) of the CrPC

competent which is absolutely lacking in the instant case, as after making application under Section 154(1) of the CrPC on 19-3-2015, though on the

same day copy was sent to the Superintendent of Police, but that will not serve any purpose, because Section 154(3) of the CrPC provides that on

refusal on the part of the Station House Officer to register commission of cognizable offence, then only application under Section 156(3) has to be

filed before the jurisdictional Superintendent of Police which is absolutely lacking in the present case. Therefore, application under Section 156(3) of

the CrPC was not competent for want of application under Sections 154(1) & 154(3) of the CrPC.

22. The principle of law laid down by the Supreme Court in Jacob Mathew (supra) and Martin F. D'Souza (supra) for registration of criminal case

against a doctor before registering an FIR under Section 154(1) of the CrPC by getting an expert opinion from a qualified doctor would apply with

equal force while registering / directing for registration of offence under Section 156(3) of the CrPC, because it is also another mode of getting the

FIR registered for which the person concerned has failed to get the FIR registered under Sections 154(1) & 154(3) of the CrPC, as by virtue of

Section 156(1) of the CrPC, it is the power and jurisdiction of the police officer to investigate any cognizable offence without the order of the

Magistrate and by virtue of Section 156(3) of the CrPC, the Magistrate is empowered under Section 190 to order such an investigation as mentioned

in Section 156(3) of the CrPC. Therefore, before directing investigation and registration of FIR under Section 156(3) of the CrPC, the principle of law

laid down by the Supreme Court in Jacob Mathew (para-52) (supra) and Martin F. D'Souza (para-106) (supra) is mandatory and has to be followed

before directing investigation against medical professionals by obtaining medical opinion from experts is sine qua non for direction of registration and

investigation of offence against medical practitioners. Thus, the course open to the learned Chief Judicial Magistrate is to call for the medical opinion

of experts in line with and as per the direction in Jacob Mathew (supra) and Martin F. D'Souza (supra) before entertaining an application under

Section 156(3) of the CrPC and directing registration of FIR and investigation against medical professional, which was not followed by the learned

Chief Judicial Magistrate while granting the application under Section 156(3) of the CrPC making the order vulnerable.

23. There is one more reason for not upholding the order directing registration of offence as well as for quashing the FIR. Respondent No.4 made a

complaint to the Medical Council of India and the said complaint was referred to the Ethics Committee of the Chhattisgarh Medical Council, Raipur to

examine the matter. The Chhattisgarh Medical Council has filed its report in the shape of Annexure P-11 stating that no medical negligence has been

found to be committed by the petitioner which has attained finality, as there is no challenge to the said finding of the disciplinary authority i.e. the

Chhattisgarh Medical Council.

24. At this stage, it would be appropriate to notice the submission of the State Counsel that even after complete investigation pursuant to registration of

FIR against the petitioner, no offence has been found to have been committed by the petitioner and Closure Report No.142/2017 has been prepared on

30-12-2017 taking into consideration the medical opinion of four doctors and necessary action is being taken to file the said report to the jurisdictional

criminal court.

25. Turning finally to the facts of the present case, the allegations made in the complaint, in my considered opinion, do not clearly constitute a

cognizable offence justifying the registration of a crime and an investigation therein and this case falls under category (1) of paragraph 102 formulated

by Their Lordships of the Supreme Court in the matter of State of Haryana and others v. Bhajan Lal and others 13 1992 Supp (1) SCC 335

warranting for exercise of inherent power under Section 482 of the CrPC to quash the FIR in Crime No.155/2016 for offence punishable under

Sections 269 and 304A of the IPC. The order impugned dated 1-2-2016 passed by the Chief Judicial Magistrate, Durg, being in violation of the

judgment of the Supreme Court in Priyanka Srivastava (supra), Jacob Mathew (supra) and Martin F. D'Souza (supra) also deserves to be quashed.

26. Accordingly, the FIR registered against the petitioner under Crime No.155/2016 in Police Station Durg, for offence punishable under Sections 269

and 304A of the IPC and the impugned order dated 1- 2-2016 are hereby quashed.

27. The writ petition is allowed to the extent indicated herein-above.

There shall be no order as to cost(s).